REMARKS

Claims 50 and 52-65 are pending in this application. Claim 50 has been amended to clarify that the sustained release dosage form comprises a cytostatic amount of a therapeutic agent comprising one of four types of agents, *i.e.*, cytostatic agent, anti-migratory agent, cytoskeletal inhibitor, or anti-matrix agent, dispersed in a polymer matrix. Claims 62-65, which depend on claim 50, have been amended to be consistent with the amendment to claim 50. Claims 59 has been amended to depend on claim 50. No new matter has been introduced. Reconsideration and allowance of the present application in view of the following remarks is respectfully requested.

THE WRITTEN DESCRIPTION REJECTION UNDER 35 U.S.C. § 112, FIRST PARAGRAPH, SHOULD BE WITHDRAWN

Claims 50 and 52-65 are rejected under 35 U.S.C. § 112, first paragraph, as allegedly containing subject mater which was not described in the specification in such a way as to reasonably convey to one skilled in the art that the inventors, at the time the application was filed, had possession of the claimed invention. For the following reasons, Applicants respectfully disagree.

I. The Legal Standard

The test for sufficiency of written description is whether the disclosure of the application "reasonably conveys to the artisan that the inventor had possession" of the claimed subject matter. *In re Kaslow*, 707 F.2d 1366, 1375 (Fed. Cir. 1983); *accord Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563 (Fed. Cir. 1991); *see also, Ralston Purina Co. v. Far-Mar-Co, Inc.*, 772 F.2d 1570, 1575 (Fed. Cir. 1985).

Where the specification discloses any relevant, identifying characteristics, *i.e.*, physical, chemical and/or functional characteristics sufficient to allow a skilled artisan to recognize the applicant was in possession of the claimed invention, a rejection for lack of written description under 35 U.S.C. § 112, first paragraph, is misplaced. *See* Guidelines for Examination of Patent Applications Under the 35 U.S.C. 112, ¶ 1, "Written Description" Requirement (the "Guidelines") (published in Volume 66, Number 4, pages 1099-1111 of the Federal Register on January 5, 2001).

II. The Claims Comply With the Written Description Requirement

The Examiner rejected the pending claims as allegedly lacking written description because (1) the term "cytostatic amount" in claim 50 is allegedly not supported by the originally-filed specification, which describes "effective amount"; (2) the negative proviso "wherein said cytostatic agent, anti-migratory agent, cytoskeletal inhibitor and anti-matrix agent are not ..." in claim 50 is allegedly not supported by the specification; and (3) the specification allegedly fails to provide any additional representative species of the claimed genus to show that Applicants were in possession of the claimed genus. For the following reasons, Applicants respectfully disagree.

First, with regard to the term "cytostatic amount", the Examiner appears to require a literal recitation of the term in the specification. However, the specification "need not describe the claimed invention in *ipsis verbis* to comply with the written description requirement." *Ex parte Sorenson*, 3 U.S.P.Q.2d 1462, 1463 (Bd. Pat. App. & Interf. 1987). "The test is whether the originally filed disclosure *reasonably* conveys to a person having ordinary skill in the art that the applicant had possession of the subject matter later claimed" (emphasis in original). *Id.* Here, the specification describes that a cytostatic amount refers to the dosage at which a therapeutic agent inhibits a vascular smooth muscle cell activity without killing the cell by exerting a relatively minimal effect on protein synthesis and a relatively larger effect on DNA synthesis. For example, the specification provides that the therapeutic agents are cytostatic and exert minimal protein synthesis inhibition and cytotoxicy *at concentrations* where significant DNA synthesis inhibition occurs (page 35, lines 5-8). Also, an agent useful in the sustained release embodiments would produce only mild to moderate morphological cytotoxic effects *at a dose* sufficient to inhibit DNA synthesis and is cytostatic (page 66, lines 19-21 and page 67, lines 1-4 and 6). Additionally, using staurosporin as an example, the specification describes that the therapeutic agent exhibits a differential between ^{3}H-leucine (protein synthesis) and ^{3}H-thymidine (DNA synthesis) uptake such that it is *cytostatic at administered doses, i.e.*, cytostatic amount (page 68, lines 14-16) (emphasis added). As such, Applicants submit that the originally-filed specification reasonably conveys to a person skilled in the art that Applicants had possession of the claimed subject matter of a "cytostatic amount" of a therapeutic agent.

Second, with regard to the Examiner's assertion relating to the negative proviso, the Examiner appears to require a literal recitation of such a negative proviso in the specification. This is contrary to the Manual of Patent Examining Procedure (MPEP) and the Federal Circuit caselaw. As discussed in the Amendment filed March 20, 2008 (*see* page 4), exclusion of one or more species of a genus in a claim is appropriate where the specification provides a generic disclosure of the genus and numerous species within the genus, including the species being excluded from the scope of the claim. *In re Johnson*, 558 F.2d 1008, 1019 (CCPA, 1977) (*see also* the MPEP, Eighth Edition, Revision 6, Sept. 2007, § 2173.05(i) at page 2100-228).

In *Johnson*, the claims of the application at issue recite a polymer formula, in which two functional groups E and E' *may not both include* a divalent sulfone group and *may not both include* a divalent carbonyl group linking two aromatic nuclei (emphasis added). 558 F.2d at 1013. These negative provisos were crafted to exclude certain species of a lost interference count involving the application's parent application. *Id.* The Patent and Trademark Office Board of Appeals ("Board") denied the priority of the claims to the parent application on the ground such negative proviso was not literally supported in the parent application, and therefore, constituted "artificial subgenus" and new matters. *Id.* at 1014. In its reversal of the Board's decision, the Federal Circuit held that literal support for the negative proviso was not required. In particular, the Federal Circuit stated that "the 'written description' in the [parent application's] specification supported the claims in the absence of the limitation, and that specification, having described the whole, necessarily described the part remaining. ... [The applicants] are merely excising the invention of another, to which they are not entitled, and are not creating an 'artificial subgenus' or claiming 'new matter.'" *Id.* at 1019. To require literal support for the negative proviso, the Federal Circuit continued, would constitute "a hypertechnical application of legalistic prose relating to [the § 112, first paragraph] provision of the statute." *Id.*

In the instant application, the specification fully describes the therapeutic agents useful in the claimed invention (*i.e.*, those inhibiting a cellular activity of a vascular smooth muscle cell without killing the cell, and in particular, the four types of therapeutic agents recited in claim 50 (*see e.g.*, page 30, line 24 to page 31, line 10). The specification also describes the species to be excluded from the scope of the therapeutic agents (*see* Amendment filed March 20, 2008 for support of each individual species in the specification).

Therefore, Applicants merely claim less than the full scope of disclosure by excising certain species from the scope of therapeutic agent in claim 50, in a similar manner as the applicants in *Johnson*, and are not creating new matters. As such, Applicants submit that the negative proviso as recited in amended claim 50 is adequately supported by the specification as originally filed.

The Examiner also asserts that "there is no one to one correspondence between the listing of agents and which are considered to be specifically anti-migratory or anti-matrix" agents" (Office Action, page 4). Applicants respectfully disagree with the Examiner's assertion that a one-to-one correspondence must be established between the excluded agents and the four types of agents, *i.e.*, cytostatic agent, cytoskeletal inhibitor, anti-matrix agent, or anti-migratory agent. Nonetheless, since claim 50 has been amended to clarify that the therapeutic agent comprises a cytostatic agent, an anti-migratory agent, a cytoskeletal inhibitor, or an anti-matrix agent, and that the excluded agents are excluded from the recited therapeutic agent, instead of from one or more of the four types of agents, a one-to-one correspondence between the four types of agents and the excluded agents is not necessary. As such, the rejection is believed to become moot. Accordingly, Applicants submit that the negative proviso which excludes certain species from the claimed invention is supported by the originally-filed specification.

Third, with regard to additional representative species of the claimed genus, Applicants submit that the specification has provided a representative number of species for the therapeutic agents useful in the invention, and, specifically, for each of the four recited types of therapeutic agents, by disclosing their respective identifying characteristics (*see e.g.*, page 30, line 30 to page 31, line 7). For example, the specification teaches that the therapeutic agents are selected to inhibit a cellular activity of a vascular smooth muscle cell, *e.g.*, proliferation, migration, increase in cell volume, increase in extracellular matrix synthesis, or secretion of extracellular matrix materials by the cell (page 30, lines 24-29). For each of the four recited types of therapeutic agents, the specification describes that a cytostatic agent will prevent or delay cell division in proliferating cells by inhibiting replication of DNA or by inhibiting spindle fiber formation (page 30, lines 30-34), a anti-migratory agent will inhibit migration of vascular smooth muscle cells from the medial wall into the intima (page 30, line 35 to page 31, line 1), a cytoskelctal inhibitor will inhibit the intracellular increase in cell volume (page 31, lines 1-2), and an anti-matrix agent will block

cellular protein synthesis and/or secretion or organization of extracellular matrix (page 31, lines 4-6). Additionally, the specification has provided numerous examples for the therapeutic agents useful for the claimed invention, and, specifically, for the four recited types of therapeutic agents.

In summary, the instant specification adequately describes a method for reducing restenosis comprising administering a sustained release dosage form comprising a cytostatic amount of a therapeutic agent, a cytostatic amount of a therapeutic agent, the therapeutic agent useful for the claimed method, the four recited types of therapeutic agents, and the individual species to be excluded from the scope of the therapeutic agent. As such, Applicants submit that one skilled in the art, based on the disclosure of the specification, would recognize that Applicants were in possession of the claimed methods at the time the application was filed.

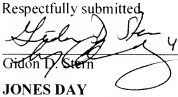
For the foregoing reasons, claim 50 is believed to have complied with the written description requirement. Claim 52-65 depend from claim 50 and therefore include the recitations of claim 50. Accordingly, Applicants respectfully request that the rejection be withdrawn.

CONCLUSION

As all rejections are believed to be overcome, all claims are believed to be in condition for allowance. An early notice to that effect would be appreciated. Should the Examiner not agree with Applicants' position, then a personal or telephonic interview is respectfully requested to discuss any remaining issues and expedite the eventual allowance of the application.

Respectfully submitted,

Date: September 29, 2008



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